Guardian Armored Assets, LLC *and* Michigan Association of Police—911, Petitioner. Case 7–RC–22204

May 24, 2002

ORDER DENYING REVIEW[1]

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the Employer's request for review of the Acting Regional Director's Decision and Direction of Election (pertinent portions of which are attached). The issues presented for review are whether the Acting Regional Director correctly found that the Petitioner is qualified to represent a unit of statutory guards under Section 9(b)(3) of the National Labor Relations Act, notwithstanding: 1) that by the language of its by laws it may admit associate members who are not statutory guards; 2) an alleged conflict of interest based on its solicitation and receipt of donations and advertising revenue from customers of the Employer; and 3) an alleged conflict of interest based on the Petitioner's representation of units of police and other public law enforcement officers. The request for review is denied as it raises no substantial issues warranting review.

In agreement with the Acting Regional Director, we find that the Petitioner is not disqualified from representing the Employer's guards simply because it also represents police officers in the public sector. Our colleague asserts that the Petitioner's representation of both groups would raise an inherent, irreconcilable conflict in situations where the police officers are called upon to investigate the Employer's guards. In essence, our colleague suggests that the police officers may not properly perform their public duties out of loyalty to their union brethren. While arguably there is a *potential* for such conflicts to occur, we do not view such conflicts as inevitable. In any event, as found by the Acting Regional Director, Board and court precedent clearly hold that the Act was not intended to address conflicts of this type. See *NLRB v. Children's Hospital*, 6 F.3d 1147 (6th Cir. 1993), enf. in relevant part 302 NLRB 235 (1991).

Our colleague also raises an additional reason for granting review of the Acting Regional Director's Decision and Direction of Election: that the Petitioner's practice of soliciting contributions from employers covered by the NLRA raises serious issues under Section 302 of the Labor Management Relations Act, 29 U.S.C. Sec. 186. Our colleague asserts that, on the record, there is reason to believe that the Petitioner "would admit to membership" employees of employers covered by the NLRA within the meaning of Section 302(a)(2), and that its solicitation activities may therefore fall within the strictures of that Section.[2] Further, he suggests that, to the extent the record is unclear on this issue, the fault lies with the Petitioner's failure to respond to the Employer's subpoenas for information about the Petitioner's membership requirements and fundraising practices.

Our colleague, however, cites no Board or court precedent holding that a union's violations, or potential future violations of Section 302 are a basis for denying certification of the union as bargaining representative. It is true that the Board has considered Section 302 in deciding whether an unfair labor practice has been committed. See, e.g., *OXY USA, Inc.*, 329 NLRB 208 (1999); *BASF Wyandotte Corp.*, 274 NLRB 978 (1985), enfd. 798 F.2d 849 (5th Cir. 1986). However, the Board has not considered Section 302 in other contexts.

In any event, we need not, and do not, decide at this point whether Section 302 would provide a basis to deny the Petitioner the benefits of certification. The Employer has not raised the Section 302 issue, and thus our denial of the Employer's request for review clearly does not by itself foreclose the Employer from raising that issue in subsequent proceedings. If the Employer does seek to raise the issue, either at the objections stage or in any subsequent unfair labor practice proceeding, we will address at that point whether the issue is properly raised and/or whether Section 302 is a basis to deny or revoke certification of the Petitioner. Cf. *Handy Andy*, 228 NLRB 447 (1977) (allegations of race, sex or other invidious discrimination by a labor organization are appropriately raised as a defense in appropriate unfair labor practice proceedings rather than offensively in representation proceedings).

Finally, we do not condone the Petitioner's failure to follow Board procedures by either complying with or petitioning to revoke the Employer's subpoenas. However, for the reasons set forth above, we agree with the Acting Regional Director that the Petitioner's failure to comply with the Employer's subpoenas at this stage of the proceeding was not prejudicial.

MEMBER COWEN, dissenting.

I would grant review.

[1] On May 22, 2002, the Board issued an Order in this proceeding denying review of the Acting Regional Director's Decision and Direction of Election. The Order issued on May 22, 2002, is vacated.

[2] It is by no means clear whether the Petitioner's fundraising would entail payments of the kind addressed by enactment of Sec. 302. See, e.g., S. Rep. 187, 86th Cong., 1st Sess., at 13 (1959), reprinted in 1 Legislative History of the LMRDA 409; *U.S. v. Percora*, 798 F.2d 614, 621–623 (3d Cir. 1986), cert. denied 479 U.S. 1064 (1987); and *U.S. v. Cody*, 722 F.2d 1052, 1058–1059 (2d Cir. 1983), cert. denied 467 U.S. 1226 (1984).

As an initial matter, I would find that the Petitioner has a clear conflict of interest in its representation of police officers in the public sector and the simultaneous representation of the Employer's guard employees. In this regard, the record clearly shows that the Employer's guard employees are involved on a weekly basis in loss investigations that are conducted by police officers represented by Petitioner, and it is not uncommon for the Employer's guard employees to be the subject of such investigations.[3] Under these circumstances, there is an inherent conflict between the Petitioner's representation of the police officers conducting the investigation and its simultaneous representation of the guards who are the subject of the investigation. Given this irreconcilable conflict, I would not certify the Petitioner as the representative of the Employer's guard employees.

Although this inherent conflict of interest is a sufficient basis to dismiss the instant petition, this case presents an even more disturbing problem. The record in this matter shows that the Petitioner regularly and systematically solicits contributions from Employers engaged in commerce within the meaning of Section 2(2) of the National Labor Relations Act. These solicitations are undertaken by a fundraising company under contract with the Petitioner and produce between 1/3 and 2/3 of Petitioner's annual revenues. As long as the Petitioner remains a union dedicated to representing employees in the public sector, this solicitation of private employers does not present an issue. However, once the Petitioner determines that it will admit to membership and seek to represent employees of employers under the National Labor Relations Act, this practice of soliciting and receiving funds from private sector employers raises serious issues of criminal conduct under Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186.

Section 302 of the Labor Management Relations Act is a broad prohibition on payments by employers to unions, and/or the solicitation or receipt of such payments, subject to very limited restrictions specifically enumerated in Section 302 (c) of the Act. Under Section 302 (a) & (b) of the Act, each payment by an employer, each solicitation by or on behalf of a union, and each receipt of any such payment by a union is a felony subject to a fine of up to $15,000.00 and imprisonment of up to 5 years. Moreover, violations of Section 302 are predicate acts which may be used to prove the existence of a racketeering enterprise under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C § 1961 *et seq*., which could result in significant additional criminal or civil liability.

Because of the Petitioner's total and unjustified failure to respond to a subpoena issued by the Employer seeking information regarding Petitioner's membership requirements and fundraising practices, the current record is incomplete. Notwithstanding the inadequacy of the record, however, it is clear that the Petitioner is now seeking to represent employees of the Employer in this matter. In addition, a representative of Petitioner testified there are no restrictions on who may become a member of Petitioner. Thus, there is reason to believe that this Petitioner would accept into membership employees of employers under the National Labor Relations Act. Although such a willingness is certainly a prerequisite to seeking certification as the representative of employees under Section 9 of the Act, that same willingness to admit to membership employees of employers under the National Labor Relations Act also risks converting Petitioner's historic funding practices into a criminal enterprise that systematically violates Section 302 of the Labor Management Relations Act.

In my view, by directing an election in this matter without a further development of the factual record, the Board risks facilitating a systematic and widespread violation of the law. This is a serious step that should not be taken without the development of a full and complete record, and the consideration of all related policy issues. Thus, I would grant the Employer's request for review and remand this case to the Regional Director for the enforcement of the Employer's subpoena and a full hearing regarding Petitioner's membership requirements and fundraising practices. In particular, prior to proceeding to an election, the Board should determine whether the Petitioner is a "labor organization . . . which . . . would admit to membership" any of the employees of the employers from which it solicits funds. *See* 29 U.S.C. § 186(a)(2). However, my colleagues do not agree. Accordingly, I dissent.

APPENDIX

DECISION AND DIRECTION OF ELECTION

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1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[3]

[3] Indeed, the Acting Regional Director specifically found that "discipline, discharge, and/or incarceration of some of the Employer's guards have resulted from these investigations."

[3] The Employer served two subpoenas duces tecum on the Petitioner seeking, *inter alia*, the names of all persons and entities who donated monies to the Petitioner in the past year and the names of all employers who were solicited to donate to the Petitioner during the same period. That information was not produced by the Petitioner and no motion to quash was filed. The Petitioner contends that the information is not in its possession because the solicitation is performed by an independent company contracted by the Petitioner for that purpose. I find that the

The Employer asserts that the Petitioner is not qualified under Section 9(b)(3) of the Act to represent a unit of guards because by the language of its by laws it admits to membership employees who are not guards. The Employer also raises two issues of conflict of interest which it contends disqualifies the Petitioner from representing the petitioned-for unit: 1) Petitioner solicits and/or received donations from customers of the Employer, and; 2) Petitioner represents police officers and other law enforcement personnel who may be called upon to investigate the conduct of the petitioned-for employees. On the basis of the entire record, I find that the Petitioner does not, in fact, admit employees other than guards to membership and that no conflict of interest exists that would disqualify the Petitioner to represent the Employer's guards.

The Petitioner's by laws provide that any individual who supports the purposes of MAP can become an associate member. There are two categories of associate member, voting and non-voting; voting associate members elect a member of the board of directors. No policies or rules have been established to limit eligibility for associate membership. The Petitioner does not have, and has not had since at least 1991, any associate members.

Section 9(b)(3) of the Act prohibits the Board from certifying any labor organization as the representative of a guard unit "if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards." The Board is reluctant to disqualify a union from representing guards based on the supposition or speculation that nonguards are members. A theoretical chance that a nonguard employee could join a union is insufficient to deny certification to that union. *Elite Protection & Security Services*, 300 NLRB 832 (1990). It is not the possibility that nonguards will become members, but whether nonguards actually are members that determines whether a union is disqualified from representing a guard unit. *NLRB v. J.W. Mays, Inc.*, 675 F.2d 442 (2d Cir. 1982), enfg. 253 NLRB 717 (1980). While Section 9(b)(3) may be literally read to disqualify a petitioner that accepts any nonguards as members, the purpose of the provision is to prevent a guard union from bargaining on behalf of nonguard members. *Sentry Investigation Corp.*, 198 NLRB 1074 (1972). The Board provides for revocation of a certification if a union certified to represent guards admits nonguards to membership. Given the absence of evidence that the Petitioner has any nonguard members, I find that the Petitioner is qualified to represent a guard unit.

The Petitioner solicits and receives donations from, and sells advertising in its magazine and newsletter to, individuals and businesses, among them customers of the Employer. The solicitation of donations and sale of advertising is contracted by the Petitioner to another company, Capitol Communications. There is no evidence that the Employer has been solicited to contribute donations or purchase advertising.

In *Bausch & Lomb Optical Co.*, 108 NLRB 1555 (1954), the Board enunciated its doctrine of disabling conflict of interest. In that case, in which the union was a direct business competitor of the employer, the Board's concern was that the union might take certain action to further its business interests rather than further the interests of the unit employees. The Board noted that in a collective bargaining relationship, it is to the benefit of all the parties that the employer remain in business, but where the union is a competitor, it could derive a benefit by causing a strike or driving the employer out of business. The conflict of interest doctrine is not limited to cases where a union and employer are in the same business; a union may also be disqualified when an enterprise controlled and dominated by the union engages in business with the employer. *St. John's Hospital & Health Center*, 264 NLRB 990 (1982). In order to find that a union has a disabling conflict of interest, the Board requires a showing of a "clear and present" danger of interfering with the bargaining process. *Alanis Airport Services*, 316 NLRB 1233 (1995). The burden to prove a conflict of interest is on the employer and it is a heavy one because of the strong public policy favoring the free choice of a bargaining agent by employees. *Garrison Nursing Home*, 293 NLRB 122 (1989).

In this case, the Petitioner does not control or dominate any enterprise that competes with, or is a customer of, the Employer. The fact that the Petitioner solicits and accepts donations from customers of the Employer does not establish a "clear and present" danger that the Petitioner will sacrifice the interests of represented employees for its own financial interests. It is not clear in what way the Petitioner might alter its bargaining proposals to encourage donations from customers of the Employer. Since it is in the interest of the parties to a collective bargaining relationship that the employer remain in business, the receipt of donations from customers of the employer would not detract from that goal. In any event, the Board will not deprive employees of their right to select their collective bargaining representative based on speculation or conjecture. Accordingly, I find that no conflict of interest exists based on the Petitioner's solicitation and receipt of donations and advertising revenue from customers of the Employer.

Petitioner represents local police and law enforcement officers in communities in which the Employer conducts its business. Local municipality police are called upon on a weekly basis to investigate variances that occur in the money or other property secured by the Employer for its customers. In the course of these investigations, it is not uncommon for the Employer's guards to be questioned. The Employer's supervisors, managers and security personnel also participate in the investigations. Discipline, discharge, and/or incarceration of some of the Employer's guards have resulted from these investigations. The Employer contends that this history gives rise to a conflict of interest because the Petitioner will be called upon to represent the Employer's guards in connection with investigations conducted by its municipality police members while it may also represent the latter officers as well. The Employer also argues that the Petitioner's police officer members may therefore not utilize the full extent of their abilities to investigate a fellow union member.

As noted by the Court in *NLRB v. Children's Hospital*, 144 LRRM 2409 (6th Cir. 1993), enfg. in relevant part 302 NLRB 235 (1991), the prohibition in Section 9(b)(3) against a union

evidence adduced on the record is sufficient for consideration of the issues raised by the Employer and the Employer has not been prejudiced by the failure to obtain full compliance with its subpoena.

admitting to membership both guards and employees other than guards was intended to alleviate not only the divided loyalties at a company plant, but the potential for divided loyalties whenever a guard is called upon to enforce the rules of his employer against any fellow union member. However, in finding that public non-guards, including police officers, are not employees under the Act, the Court explained that while such a result may frustrate the goal of Section 9(b)(3) to prevent guards from having divided loyalties between their employer and fellow union members, the Act was not written to prevent divided loyalty in the public sector. In *University of Tulsa*, 304 NLRB 773 (1991), the Board included municipal police officers who "moonlighted" as part-time guards in a guard unit despite their potential to enforce criminal laws against fellow guards in a strike situation. Representation of insurance agents and investigators, whose investigations affect the earnings and employment status of the agents, by the same union did not present a conflict of interest sufficient to limit the full freedom of employees to select a bargaining representative in *American Service Bureau*, 105 NLRB 485 (1953). I therefore find that the Petitioner is not disqualified from representing a unit of the Employer's guards because it also represents units of police and other public law enforcement officers.

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The Employer is an armored car business engaged in the transportation and receiving of cash and other valuables, the servicing and maintaining of automatic teller machines (ATMs), and the counting and controlling of currency and deposits for financial institutions and other customers. The parties stipulated to the appropriate unit of 47 full-time and regular part-time guards as defined in Section 9(b)(3) of the Act, including guards, drivers/messengers, vault employees, dispatchers, messengers/ATM balancers, ATM first line maintenance employees, and security officers employed at the Employer's facility located at 931 East Hamilton Street, Flint, Michigan, but excluding supervisors, as defined in the Act, and all other employees. . . .